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No. 84-1135

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE COMMISSIONER OF TRANSPORTATION
OF THE STATE OF NEW YORK,
Petitioner,

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
and GREYHOUND LINES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION OF RESPONDENT GREYHOUND LINES, INC.

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QUESTION PRESENTED

Whether the Second Circuit was correct in ruling that the Interstate Commerce Commission acted neither arbitrarily nor capriciously in holding that Petitioner had failed to rebut the statutory presumption that Greyhound's intrastate fares constituted an unreasonable burden on interstate commerce.

STATEMENT REQUIRED BY RULE 28.1

Respondent Greyhound Lines, Inc., is a wholly-owned subsidiary of The Greyhound Corporation. A list of the principal subsidiaries of The Greyhound Corporation and the subsidiaries and affiliates of Greyhound Lines, Inc., appears in an Appendix hereto.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT REQUIRED BY RULE 28.1	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	3
APPENDIX	1a

TABLE OF AUTHORITIES

Cases Page

Alabama Public Service Comm'n v. *ICC*, No. 84-7374 (11th Cir. Feb. 22, 1985) 5
Chicago, Milwaukee, St. P. & P.R. Co. v. *Illinois*, 355 U.S. 300 (1958) 5
Florida v. *United States*, 282 U.S. 194 (1931) 5
Miller v. *Youakim*, 440 U.S. 125 (1979) 4
North Carolina v. *United States*, 325 U.S. 507 (1945) 5
Public Service Comm'n of Utah v. *United States*, 356 U.S. 421 (1958) 5
Public Service Comm'n of West Virginia v. *ICC*, No. 84-1437 (4th Cir. Nov. 16, 1984) 5
Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) 4

Statutes

5 U.S.C. § 706(2)(A) 4
49 U.S.C. § 13(4) 4
Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 96 Stat. 1102 (codified in part at 49 U.S.C. § 11501(e)) ..... *passim*

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STATEMENT OF THE CASE

In May 1983, Respondent Greyhound Lines, Inc. ("Greyhound"), requested an increase in intrastate passenger fares from Petitioner Commissioner of the New York State Department of Transportation (hereinafter "NYDOT"). NYDOT suspended the proposed increase and conducted a hearing on Greyhound's request. At the

hearing, Greyhound produced conclusive and unrebutted evidence that its intrastate fares in New York were less than its interstate fares for transportation between the same points.

Despite this disparity in rates, a New York Administrative Law Judge denied Greyhound's proposed increase because he concluded that Greyhound's New York operations were profitable. Pet. App. 26a-37a. Greyhound appealed this decision to the Interstate Commerce Commission ("ICC" or "Commission").

The Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 96 Stat. 1102 (codified in part at 49 U.S.C. § 11501(e)(2)(A)(i)), presumes a burden on interstate commerce where, *inter alia*, intrastate rates are lower than the interstate rates for comparable transportation. Greyhound invoked this statutory presumption, thus shifting the burden of proof to NYDOT to rebut this presumption. Before the ICC, NYDOT offered four contentions in rebuttal: (1) the NYDOT's ruling was reasonable; (2) significant differences between intra- and interstate operations justified the rate disparity; (3) Greyhound enjoyed a monopoly in many areas of New York; and (4) NYDOT subsidized certain Greyhound routes.

After hearing evidence from both sides, the Commission rejected each of NYDOT's arguments. The ICC held that, even with the proposed rate increase, Greyhound's intrastate rates were lower than the interstate rates for comparable travel in New York. It ruled that NYDOT's proffered evidence was insufficient to rebut the statutory presumption of an unreasonable burden and therefore that NYDOT's ruling was *not* reasonable. The rate disparity, according to the Commission, was not justified because the record did not support any differences in operating conditions or cost of service. NYDOT's assertion that Greyhound enjoyed a monopoly on certain routes was "simply not on point." Pet. App. 24a. This was ob-

viously because Greyhound experienced substantial competition on every one of its major New York routes, and those few routes without direct bus competition were "marginal at best." Pet. App. 23a. Finally, that NYDOT subsidized certain low revenue routes was insufficient for two reasons: (i) the subsidy was merely temporary; and (ii) even with the subsidy included, a significant rate disparity still existed. Pet. App. 24a. Accordingly, the ICC granted Greyhound's proposed rate increase.

NYDOT appealed the Commission's decision to the Second Circuit, which concluded that the Commission's interpretation of Section 11501(e) and its decision were reasonable. NYDOT now petitions this Court for a writ of certiorari.

REASONS FOR DENYING THE WRIT

This case, even in its pristine form, presents narrow issues reasonably decided by the Second Circuit without dissent and with no conflicting view from any other Circuit. But its resolution here is made even easier by Petitioner's concessions and the issue Petitioner has abandoned:

1. Petitioner does not challenge the resolution of the principal issue decided by the ICC and the Second Circuit. *See* Pet. at 9 n.2.[1]

2. Petitioner conceded in the Court of Appeals[2] that the correct standard of judicial review to be applied to

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[1] That issue was whether the ICC must find the existence of *both* one of the three criteria in Subsection 11501(e)(2)(A) *and* the criterion in Subsection 11501(e)(2)(B). Pet. App. 6a-12a.

[2] The "Brief for Petitioner State of New York" filed in the Second Circuit conceded both in its "Summary of Issues for Review" (p. iv) and in the body of its argument (pp. 19-20) that the issue was whether the ICC's decision was "arbitrary and capricious."

the Commission's interpretation of Section 11501(e) and its decision in this case is the deferential arbitrary and capricious standard set forth in 5 U.S.C. § 706(2)(A). *See generally Miller* v. *Youakim*, 440 U.S. 125, 145 n.25 (1979) (agency's interpretation " 'should be followed unless there are compelling indications that it is wrong' ") (quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969)).

3. Petitioner argues that former Section 13(4) of the Interstate Commerce Act, former 49 U.S.C. § 13(4), is applicable here. Pet. at 13. But under that Section, the burden of proof rested on the rail carrier, and Petitioner concedes that the burden of proof is entirely different under the Bus Act. Pet. at 16; *see also id.* at 6. The Bus Act creates a rebuttable presumption that interstate commerce is unreasonably burdened whenever intrastate rates are lower than their interstate counterparts.

4. Petitioner argues that primary authority for setting intrastate rates rests with the States, but he then concedes that the ICC can overturn a State's decision *on a case-by-case basis* whenever those rates constitute an unreasonable burden on interstate commerce. Pet. at 14, 16.

In light of what Petitioner does not argue and his concessions—which are mandated by the Bus Act itself—this case comes down simply to whether the ICC, in this particular set of circumstances, correctly decided that NYDOT failed to rebut the statutory presumption that Greyhound's intrastate rates unreasonably burdened interstate commerce because they were lower than the interstate fares for comparable transportation.

Petitioner's recitation (Pet. at 11-12) of the rate decisions coming before the Commission—even if accurate [3]

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[3] Petitioner has greatly over-simplified the factual and legal circumstances underlying those decisions.

—does not prove that the Commission is arbitrarily increasing intrastate rates merely because they are lower than interstate fares. Quite the contrary. Petitioner's own recitation reveals that different factual and legal analyses have gone into each decision.

Petitioner's only decisional authority consists of four cases interpreting an entirely different statute, all decided between 1931 and 1958: *Public Service Comm'n of Utah* v. *United States*, 356 U.S. 421 (1958); *Chicago, Milwaukee, St. P. & P.R. Co.* v. *Illinois*, 355 U.S. 300 (1958); *North Carolina* v. *United States*, 325 U.S. 507 (1945); and *Florida* v. *United States*, 282 U.S. 194 (1931). This reliance is simply inexplicable in light of NYDOT's concession, noted above, that the burden of proof has entirely shifted to the Petitioner under the Bus Regulatory Reform Act of 1982.

Two other Circuits have interpreted § 11501(e) and have followed the Second Circuit's ruling in favor of the ICC's construction of the statute. *Alabama Public Service Comm'n* v. *ICC*, No. 84-7374 (11th Cir. Feb. 22, 1985) (summary affirmance of ICC's decision); *Public Service Comm'n of West Virginia* v. *ICC*, No. 84-1437 (4th Cir. Nov. 16, 1984) (unpublished decision). This consensus among the lower courts further demonstrates that this case presents no questions deserving this Court's review.

At bottom, Petitioner's argument is that Greyhound's intrastate New York operations were more profitable than its Eastern Division's operations, as shown by its operating ratios, and th[illegible]he Second Circuit was wrong in concluding that these operating ratios were not a reliable guide to profitability because of the difficulty of allocating a portion of total expenses to Greyhound's intrastate operations.

Without exploring the ways in which Petitioner is simply *wrong* in his factual analyses, suffice it to say this is hardly an issue that merits this Court's attention.

Respectfully submitted,

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APPENDIX

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LIST OF PRINCIPAL SUBSIDIARIES OF THE GREYHOUND CORPORATION (ARIZONA) AND SUBSIDIARIES AND AFFILIATES OF GREYHOUND LINES, INC. (CALIFORNIA)

Parent-subsidiary or affiliate relationships are shown by marginal indentation. State, province or country of incorporation and ownership percentage are shown in parentheses following each name, except that no ownership percentage appears for 100 percent owned subsidiaries. If ownership is divided between two affiliates, the ownership percentage of both is combined and is not in parentheses, and in such cases the company is listed as a subsidiary or affiliate of the company holding the highest percentage of stock. The list does not include companies in which the direct or indirect interest of The Greyhound Corporation is less than 20 percent.

TRANSPORTATION GROUP

GREYHOUND LINES, INC. (California)

Atlantic Greyhound Lines of Virginia, Inc. (Virginia)
California Parlor Car Tours Company (California)
Greyhound Bus Depot of Atlanta, Inc. (Georgia) (87%)
Greyhound de Mexico, S.A. de C.V. (Mexico)
Greyhound Lines of Canada Ltd. (Canada) (68%)
Brewster Transport Company Limited (Alberta)
Columbia Icefield Snowmobile Tours Ltd. (Alberta)
Coachways Systems Ltd. (Alberta)
Alaskan Coachways Limited (Alaska)
Canadian Coachways (Alberta) Limited (Alberta)
Eastern Canadian Greyhound Lines, Limited (Ontario)
Motor Coach Industries Limited (Manitoba)
Frank Fair Industries Ltd. (Manitoba)

Greyhound-Taseco Saudi Arabia Ltd. (Saudi Arabia) (40%)
Greyhound World Tours, Inc. (Arizona)
Greyhound World Travel B.V. (Netherlands)
Greyhound World Travel A.G. (Switzerland)
Greyhound World Travel BmbH (Austria)
Greyhound World Travel GmbH (Germany)
Greyhound World Travel Limited (United Kingdom)
Greyhound World Travel S.A.R.L. (France)
Jefferson Lines Holding Company (Minnesota) (40%)
Jefferson Lines, Inc. (Minnesota)
Jefferson Services, Inc. (Minnesota)
Midland Lines, Inc. (Minnesota)
Kerrville Bus Company, Inc. (Texas) (40%)
Kerrville Tours, Inc. (Texas)
Painter Bus Lines, Inc. (Texas)
Union Bus Center of San Angelo, Inc. (Texas)
Southern Stages, Inc. (Georgia) (40%)
Springfield Bus Terminal Corporation (Massachusetts) (32%)
Union Bus Station of Oklahoma City, Oklahoma (Oklahoma) (20%)
WGL Properties, Inc. (Delaware)
Wilmington Union Bus Station Corporation (North Carolina) (25%)
Texas, New Mexico & Oklahoma Coaches, Inc (98%)
Vermont Transit Co., Inc.

BUS MANUFACTURING GROUP

Motor Coach Industries, Inc.
Motor Coach Industries Limited (68%)
Transportation Manufacturing Corporation
Universal Coach Parts, Inc.

FOOD SERVICE GROUP

Faber Enterprises, Inc.
Glacier Park, Inc. (80%)

Greyhound Food Management, Inc.
Greyhound Support Services, Inc.

CONSUMER PRODUCTS GROUP

Armour-Dial, Inc.
Armour Handcrafts, Inc.
Armour International Company

FINANCIAL GROUP

Greyhound Computer Corporation
Greyhound Financial & Leasing Corporation AG (65%)
Greyhound Leasing & Financial Corporation
Greyhound Realty Corporation
MCI Acceptance Corp.
Pine Top Insurance Company
Pipe Top Insurance Company Limited (U.K.)
Travelers Express Company, Inc.
Verex Corporation

SERVICES GROUP

Aircraft Service International, Inc.
Consultants & Designers Inc.
Dispatch Services, Inc.
Florida Export Tobacco Co. Inc.
Greyhound Exhibitgroup Inc.
Greyhound Exposition Services, Inc.
Greyhound Temporary Personnel, Inc.